Supreme Court, U.S.
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# In the Supreme Court of the United States

WASHINGTON INTERNATIONAL INSURANCE COMPANY,
*Petitioner*,

v.

UNITED STATES,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The presence of 19 packages of cocaine on the M/V FRIENDLY EXPRESS in the Port of Miami, Florida, on July 2, 1998, resulted in two separate actions of the Government -- the filing of an *in personam* civil penalty action against the obligors of a $50,000 international transportation bond and the filing of an *in rem* forfeiture action against the vessel. While both actions are authorized by law, a significant federal issue exists as to whether Supreme Court precedent on *res judicata* was ignored or improperly limited, where the Eleventh Circuit held that the settlement of the forfeiture case did not preclude seeking civil penalties against a party not involved in the forfeiture action or its settlement.

**The *In Rem* Forfeiture Action.** The Government filed an action against the vessel on September 30, 1999. Ameritrade Terminals, Inc. (Ameritrade), as agent of the vessel owner, filed an answer and verified claim asserting a maritime lien claim for agency fees, crew advances, penalties and fines furnished for the vessel in the amount of $571,300.

On June 7, 2000, the United States and Ameritrade entered into a settlement agreement of the *in rem* forfeiture action. Under that agreement, the vessel was forfeited to the government. The government paid Ameritrade $5,306.83 in satisfaction of its claims and allowed it to file an out-of-time administrative petition for relief within thirty (30) days of the agreement contesting the civil penalty. On June 27, 2000, the District Court granted the government's motion for default judgment of forfeiture against the vessel and approved and adopted the settlement agreement.

**The Civil Penalty Case.** The obligors under the bond were the ship's agent, Ameritrade, as principal, and

Washington International Insurance Company (Washington) as its jointly and severally liable surety. Shortly after September 2, 1999, the Government sent Ameritrade a Notice of Civil Penalty of $566,000. On or about May 2, 2000, the Government sent Washington a Notice of Civil Penalty in the same amount, subject to its bond limitation ($50,000). Each was allowed sixty (60) days to submit a petition for relief.

On June 27, 2003, the Government filed suit to collect the civil penalty against both Ameritrade and Washington. The District Court dismissed against both defendants because the action was barred by the doctrine of *res judicata*. The Eleventh Circuit reversed against both the principal and surety because it found that the settlement agreement in the *in rem* action preserved the right to bring the second action. The Eleventh Circuit did not consider Petitioner's argument that it was not a party to any settlement agreement and could not be prejudiced by the agreement's language.

**The Questions.** The two related questions are:

1) Whether the Eleventh Circuit's decision precluding a non-party to a consent judgment from raising *res judicata* in a second action conflicts with this court's ruling in *Local Number 93, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 529 (1986), which held that a consent judgment may not dispose of claims of a third party or impose duties or obligations on a third party.

2) Whether a settlement agreement, which purports to limit the right to raise *res judicata* in a later case, is binding on a nonparty who would otherwise be able to invoke *res judicata*.

## RULE 14.1(b) STATEMENT AND STATEMENT OF RELATED PARTIES

The Petitioner is Washington International Insurance Company (Washington) and the Respondent is The United States. Ameritrade Terminals, Inc., a defendant and appellee below, is not a party to this appeal.

Washington's direct parent is North American Specialty Insurance Co., a closely-held corporation. North American Specialty Insurance Co., is owned by Swiss Re America Corp., a closely-held corporation. Swiss Re America Corp. is owned by Swiss Reinsurance Co., a publicly held Swiss company.

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## PETITION FOR A WRIT OF CERTIORARI

Washington International Insurance Company ("Washington") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, 1a-6a) is unreported. The opinion of the district court (App. *infra*, 7a-15a) is unreported.

## JURISDICTION

The judgment, which the Petitioner seeks to reverse, was entered on March 31, 2006. This petition is being filed within ninety (90) days after entry of that judgment. This court has jurisdiction to review on a writ of certiorari the judgment in question pursuant to 28 U.S.C. § 1254.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

There are no statutory or regulatory provisions involved.

## STATEMENT OF THE CASE

### 1. Background

On or about July 1, 1998, acting as the Miami ship agent for the M/V FRIENDLY EXPRESS, Ameritrade Terminals, Inc. ("Ameritrade") notified U.S. Customs that the vessel would be arriving in Miami from Cap Haitien, Haiti and that Washington International Insurance Company (Washington)

was the surety on its international transportation bond. (App. *infra*, 47a - 53a).

When the vessel arrived on or about July 2, 1998, its master signed U.S. Customs Form 1301 (General Declaration) stating that the vessel was in ballast and was carrying no cargo to manifest. Soon thereafter, Customs found that the vessel carried nineteen (19) packages of illegal drugs (cocaine). Customs seized the vessel and took control of its documents (19 U.S.C. §1595a, 19 U.S.C. §1703 and/or 49 U.S.C. §80303). Even though the illegal drugs had already been discovered and the vessel had been seized, U.S. Customs required Ameritrade to submit a formal entry (*Id.*)

Customs issued a Notice of Civil Penalty to the vessel's owner (19 U.S.C. §1584(a)(2)) and receipt of that notice was acknowledged by its agent, Ameritrade, on August 28, 1998. By letter dated September 2, 1998, Customs notified Ameritrade that it would continue to seek a $566,000 penalty against Ameritrade. On or about May 2, 2000, Customs issued a Demand Notice of Penalty to Washington as surety on the international carrier's bond covering the same civil penalty. (*Id.*)

**2. The In Rem Forfeiture Action**

On September 30, 1999, over one year after the initial seizure, the United States filed a complaint for forfeiture *in rem* against the M/V FRIENDLY EXPRESS in the U.S. District Court, Southern District of Florida, Case No. 99-Cv-2633 (Seitz) (hereinafter referred to as the "forfeiture action".) The basis for this forfeiture was the presence on board the vessel of 19 packages of cocaine. The forfeiture action was brought pursuant to 19 U.S.C. § 1595a, 19 U.S.C. § 1703 and/or 49 U.S.C. § 80303. (App. *infra*, 16a-21a).

On November 1, 1999, in the forfeiture action the owner of the M/V FRIENDLY EXPRESS filed a claim alleging ownership of the vessel. On or about November 4, 1999, Ameritrade filed a verified claim alleging that it had a maritime lien for agency fees, crew advances, penalties and fines furnished for the vessel in the amount of $571,300. On November 16, 1999, both Claimants filed answers to the complaint. (App. *infra*, 31a-37a).

On June 7, 2000, in the forfeiture action, the United States and Ameritrade entered into a settlement agreement. The vessel was forfeited to the government. The United States paid $5,306.83 in satisfaction of Ameritrade's claim and Ameritrade was allowed to file an out-of-time administrative petition for relief to contest the civil penalty within thirty (30) days. On June 29, 2000, the court granted a motion for default judgment of forfeiture against the vessel and approved and adopted the settlement agreement. On July 1, 2000, that forfeiture action was closed. (App. *infra*, 22a-37a).

**3. The Civil Penalty Action - District Court**

On June 27, 2003, the United States filed suit in the same court to collect a civil penalty against the $50,000 international transportation bond under which Washington was surety and Ameritrade was the principal. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1345 and 1355(a).

On September 16, 2004, the district court granted summary judgment for Ameritrade and Washington on the ground that *res judicata* barred the Government's claim because the civil penalty claim should have been brought as a part of an earlier forfeiture action.

The district court found that all of the requirements for *res judicata* were satisfied. The prior forfeiture action was brought in a court of competent jurisdiction and ended in a judgment on the merits. It noted that consent judgments are considered as having the same force and effect as judgments entered after trial on the merits. The district court noted that United States and Ameritrade were parties to both actions and that there is no question that Ameritrade and Washington are in privity since together they issued the bond for the M/V FRIENDLY EXPRESS. Finally, the court determined that the causes of action were the same in both cases. Both actions arose from the same nucleus of operative facts and were based upon the same factual predicate, *i.e.*, the presence of cocaine aboard the M/V FRIENDLY EXPRESS.

On page 8 of its decision, the District Court addressed the effect of the settlement agreement by noting "additionally the mere fact that Ameritrade reserved the right to dispute the penalty in the settlement agreement does not serve to reserve the present action. If those were the United States' intentions, that needs to be specifically stated in the terms of the agreement." (App. *infra*, 15a). Since the District Court found that the settlement agreement did not impact the preclusive effect of the first judgment, the court never reached the specific issue, which Petitioner is now raising.

**4. The Civil Penalty Action - Eleventh Circuit**

The Eleventh Circuit reversed under its precedent in *Norfolk S. Corporation v. Chevron USA, Inc.*, 371 F.3d 1285 (11th Cir. 2004) and found "by expressly contemplating that the penalty proceeding would go forward, the settlement agreement could not have intended to preclude the government from enforcing the civil penalty against Ameritrade and Washington." (App. *infra*, 6a,7a). The

Eleventh Circuit failed to consider Washington's argument that it was not a party to any settlement agreement and that its rights to raise the *res judicata* defense could not be prejudiced by Ameritrade.

## REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision precludes a nonparty to a consent judgment from raising *res judicata* in a second action. That decision directly conflicts with this court's ruling in *Local Number 93, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 529 (1986), which found that a consent judgment may not dispose of claims of a third party or impose duties or obligations on a third party.

This court has previously held that a judgment in an *in rem* forfeiture action may bar a second *in personam* action for a statutory penalty. *Hills & Co. v. Hoover*, 220 U.S. 329 (1911) (*Res Judicata* barred second action for statutory penalties for copyright infringement where judgment in earlier action sought to forfeit infringing goods.) *See also, United States v. Cunan*, 156 F.3d 110 (1st Cir. 1998); *Ray v. Leatherman*, 688 So.2d 1133 (La. App. 3 Cir. 1996).

Our case differs from *Hoover* in that here the parties to the *in rem* action entered into a settlement agreement, which the court incorporated into the consent judgment. However, Washington was a stranger to the first action and any settlement agreement, which purports to modify any preclusive effect of the judgment. Any terms of a settlement agreement to which it was not a party, may not impair Washington's rights to the benefits of *res judicata*. This court ruled in *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 529 (1986) that:

> Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. [*citations omitted.*] And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." [478 U.S. at 529]

The Government could have brought the civil penalty action with the forfeiture. Had that happened, at that time Washington could have asserted its rights to indemnity and exoneration against Ameritrade for any payments and unsatisfied obligations owed the Government as the beneficiary of the bond. Since Ameritrade made a claim for money in the first action and received funds in settlement, those claims and moneys would have been available to Washington to the extent of its $50,000 obligation under the international transportation bond.

Even without the maritime lien and payment of settlement funds, the significant lapse of time prejudiced Washington in its ability to seek at a later time indemnity and exoneration against Ameritrade. This court ruled in *United States v. Hodge*, 47 U.S. 279, 283 (1848), that if the remedy on a bond is suspended, for valuable consideration, a surety is released since its right to discharge the obligation and be subrogated is also suspended.

Although the modern view, at least for compensated sureties, is not as arbitrary, today the surety's obligations

may be discharged if a creditor (obligee, *i.e.*, the government) acts to increase the surety's (secondary obligor's, *i.e.*, Washington's) risk of loss by decreasing its potential ability to cause the principal (principal obligor, *i.e.*, Ameritrade) to bear the cost of performance. *Restatement Third Suretyship and Guaranty* § 37 Impairment of Suretyship Status (1996).

The Supreme Court's *res judicata* decision defines a rule, which clearly protects the interests of potential litigants and the Eleventh Circuit's decision violates, ignores or severely limits that rule so as to inflict the very prejudice that the rule seeks to avoid. If the Government had brought the penalty action with the forfeiture action, Washington would have been able to reach any payment in satisfaction of Ameritrade's maritime lien. It would have had the ability to immediately pursue its remedies against Ameritrade for indemnity or exoneration.

The Court should grant this petition in order to clarify and interpret its own precedent in *Local Number 93 v. City of Cleveland, supra*. Neither the Government nor Ameritrade had the right to bind Washington to the terms of their own private settlement agreement depriving Washington of the rights and benefits flowing from the *res judicata* doctrine.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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June 29, 2006

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**No. 05-10262**

**[Filed March 31, 2006]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| versus | ) |
| | ) |
| AMERITRADE TERMINALS, INC., | ) |
| | ) |
| Defendant-Cross-Defendant-Appellee, | ) |
| | ) |
| WASHINGTON INTERNATIONAL INSURANCE CO., | ) |
| | ) |
| Defendant-Cross-Claimant-Appellee. | ) |
| | ) |

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 03-21755 CV-SH

Before DUBINA and HULL, Circuit Judges, and RESTANI*, Judge

**OPINION**

PER CURIAM:

This is an appeal from the district court's grant of summary judgment based on *res judicata* in favor of Defendant-Appellees Ameritrade Terminals, Inc. ("Ameritrade") and Washington International Insurance Co. ("Washington") in a civil action brought by the United States to enforce administrative penalties.

I.

Ameritrade acts as a shipping agent for vessels entering the United States. Washington provides international maritime bonds for shipping agents such as Ameritrade. Ameritrade acted as the port agent for a ship called the M.S. Friendly Express, Inc. ("Friendly Express"). Ameritrade, together with Washington, issued a $50,000 bond on behalf of the Friendly Express.

In the summer of 1998, the Friendly Express entered the port of Miami and customs agents discovered 51 lbs. of cocaine on board. The Friendly Express's manifest declared that it had no cargo. The Friendly Express was seized and the government issued a Notice of Penalty to Friendly Express, Ameritrade, and Washington. The penalty for Ameritrade and Washington was the forfeiture of the $50,000 bond.

---

* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

The government then initiated forfeiture proceedings against the Friendly Express. During the forfeiture proceedings, Ameritrade filed a claim to collect on the expenses it incurred as a result of the ship's seizure.

Subsequently, Ameritrade and the government entered into a settlement in which Ameritrade received $5,306.93 for monies that the Friendly Express owed Ameritrade. The case was closed.

Ameritrade and Washington then pursued administrative remedies attempting to overturn the $50,000 penalty. The government denied Ameritrade's and Washington's administrative attempts to overturn the $50,000 penalty. Thereafter, the government filed a civil penalty action against Ameritrade and Washington pursuant to 19 U.S.C. § 1584(a)(2).[1] The civil penalty sought forfeiture of the $50,000 bond because of cocaine found on the Friendly Express.

The district court granted summary judgment to Ameritrade and Washington concluding that the government's claim was barred under the doctrine of *res judicata*. According to the district court, the four criteria for *res judicata* were met: (1) the prior decision was from a court of competent jurisdiction; (2) the prior decision constituted a judgment on the merits; (3) the same parties (or those in privy with the parties) were litigating the second claim; and (4) the two claims arose out of the same cause of action. In granting

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[1] Section 1584(a)(2) makes various entities liable for civil penalties when there are falsities on a ship's manifest. The merits of the government's claim under § 1584(a)(2) are not the subject of this appeal, and, thus, are not discussed in this opinion.

summary judgment, the district court rejected the government's argument that *res judicata* did not apply because the first cause of action was an *in rem* proceeding and the second cause of action was an *in personam* proceeding. The district court also rejected the government's claim that it was unable to bring the *in personam* cause of action at the same time of the forfeiture action. The government moved for reconsideration and the district court denied the motion. The government then perfected this appeal.

II.

The following issues are presented for appellate review:

(1) Whether the district court properly granted summary judgment based on *res judicata* in favor of Ameritrade and Washington in a civil action brought by the government to enforce administrative penalties; and

(2) Whether the district court abused its discretion in denying the government's motion for reconsideration of its summary judgment order.

III.

We review a district court's grant of summary judgment *de novo* and, thus, we must apply the same legal standards used by the district court. *Levinson v. Reliance Standard Life Ins. Co.*, 245 F.3d 1321, 1325 (11th Cir. 2001). We review for an abuse of discretion the denial of a motion to reconsider. *United States v. Simms*, 385 F.3d 1347, 1356 (11th Cir. 2004). A district court abuses its discretion if it misapplies the law. *See Delta Air Lines, Inc. v. Air Line Pilots Ass'n., Int'l.*, 238 F.3d 1300, 1308 (11th Cir. 2001). ("[W]e accord no deference to the district court's

misapplication of the law.") "Because *res judicata* determinations are pure questions of law, we review them *de novo." Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1288 (11th Cir. 2004).

IV.

The first cause of action in this case was dismissed after the parties entered into a settlement agreement. When the first cause of action is settled, the *res judicata* doctrine applies in a modified form, and the settlement agreement, not the original complaint, governs the scope of the doctrine. *Norfolk,* 371 F.3d at 1288 ("A judgment dismissing an action with prejudice based on the parties' stipulation, unlike a judgment imposed at the end of an adversarial proceeding, receives its legitimate force from the fact that the parties consented to it."). "In determining the *res judicata* effect of an order of dismissal based upon a settlement agreement, we should also attempt to effectuate the parties' intent. The best evidence of that intent is, of course, the settlement agreement itself." *Id.* at 1289.

Paragraph 12 of the settlement agreement provides that "[t]he parties stipulate and agree that the payment of Ameritrade's claim in this case will establish no precedent or basis for payment of any similar future claim of Ameritrade or any other party." Settlement Agreement ¶ 12. Furthermore, immediately after the settlement, Ameritrade and Washington attempted to pursue administrative remedies to set aside the forfeiture of the $50,000. Given ¶ 12 of the settlement agreement and the parties' actions, we conclude that the settlement agreement in this case does not act as a bar to the government's subsequent claim to enforce the civil penalties. Accordingly, the district court committed reversible error in granting summary judgment against the government

in favor of Ameritrade and Washington on *res judicata* grounds. Likewise, the district court abused its discretion in denying the government's motion for reconsideration concerning the court's interpretation of the *in rem* settlement agreement's preclusive effect because, by doing so, it disregarded the law of this circuit which holds that, when prior litigation is resolved by settlement, *res judicata* applies only to those matters specified in the settlement. Here the settlement agreement resolved the *in rem* forfeiture claim only and Ameritrade's maritime lien against the forfeited vessel. By expressly contemplating that the penalty proceeding would go forward, the settlement agreement could not have intended to preclude the government from enforcing the civil penalty against Ameritrade and Washington.

For the foregoing reasons, we reverse the district court's grant of summary judgment in favor of Ameritrade and Washington and its order denying reconsideration, and remand this case to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Case No. 03-21755**

**[Filed September 16, 2004]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| AMERITRADE TERMINALS, INC. and WASHINGTON INTERNATIONAL INSURANCE COMPANY, | ) |
| | ) |
| Defendants. | ) |

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE is before the Court upon Defendants Washington International Insurance Company and Ameritrade Terminals, Inc.'s (collectively "the Defendants") Motions for Summary Judgment (DE 26, 31) and Plaintiff United States Motion for Summary Judgment (DE 35). For the reasons stated below, the Defendants' motions are GRANTED and Plaintiff's Motion is DENIED.

## I. Summary Judgment Standard

The purpose of summary judgment is to assess the evidence to determine whether an actual need for trial exists. *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 590 (11th Cir. 1994). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are identified by the substantive law applicable to the particular case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Mulhall v. Advance Security, Inc.*, 19 F.3d at 590. Only facts that "might affect the outcome of the suit under the governing law" are material. *Anderson*, 477 U.S. at 248.

After adequate time for discovery and upon motion, Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" *Celotex*, 477 U.S. at 322. In such a case, no genuine issue of material fact exists because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. Accordingly, the moving party is entitled to a judgment as a matter of law "because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.*

## II. Background

The United States, on behalf of the former United States Customs Service, Department of Treasury ("the Plaintiff") filed this civil penalty action against the Defendants pursuant to 19 U.S.C. § 1584(a)(2). Defendant Ameritrade Terminals, Inc. ("Ameritrade") acts as a shipping agent for vessels that enter into the United States. Defendant Washington International Insurance Company ("WIIC") provides international marine bonds for shipping agents, like Ameritrade, who represent vessels entering the ports of United States. Ameritrade acted as the port agent for the M.S. Friendly Express, Inc. ("Friendly Express") and together with WIIC issued an International Carrier Bond of $50,000.00 on behalf of the Friendly Express. On or about July 2, 1998, the Friendly Express entered the Port of Miami and, upon inspection, customs agents discovered 51 pounds of cocaine within the vessel, in contradiction with the vessel's Manifest, presented to Customs, that indicated the ship had no cargo.[1]

The Friendly Express was seized and the United States issued a Notice of Penalty to Friendly Express and to both Ameritrade and WIIC. The United States then brought a forfeiture action against the Friendly Express ("Forfeiture Action"), wherein Ameritrade filed a claim to collect on the

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[1] The Court is only addressing the relevant facts that are undisputed as presented in the Defendant's Motion for Summary Judgment (DE 26) and in United States Response to that Motion (DE 33) as well as their own Motion for Summary Judgment (35). The only fact that remains in dispute is whether or not the master of the vessel attempted to amend the manifest, and the Court finds that fact to be irrelevant for purposes of this motion.

expenses it incurred as a result of the ships seizure.[2] The Plaintiff and Ameritrade entered into a settlement agreement that resulted in a default judgment on behalf of the Plaintiff, where by the vessel was forfeited and Ameritrade was paid the expenses it incurred as a result of the seizure. The case was subsequently closed. The counts in the present action allege both Ameritrade and WIIC failures to pay civil penalties in violation of 19 U.S.C. § 1584(a)(2) that were the result of the incorrect Manifest that was presented to Customs.

The Defendants have moved for summary judgment primarily arguing that this action is barred by the doctrine of res judicata because the United States should have included this claim in the prior forfeiture action. The additional arguments put forth by the Defendants are that the port agent should have been allowed to amend the Manifest, once the drugs were discovered, and that 19 U.S.C. § 1623 does not allow the United States to collect on the bond from the port agent and surety who are unaware of the violations.

In response to the motion, the Uniled States asserts that the Defendants' motion should be denied because the claim is not barred by res judicata because there is a different cause of action in each suit. The prior action was an *In Rem* Civil Forfeiture action and the current action is an *In Personam* Civil Penalty action. In addition, the United States argues that the only time a correction to the manifest is appropriate is when there appears to have been a clerical error or mistake and that 19 U.S.C. § 1623 gives Customs the authority to demand an International Carrier Bond to ensure compliance

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[2] United States v. Motor Vessel Friendly Express 99-2633-Civ-Seitz.

with the manifesting regulations set forth by the United States.[3]

The motion is now ripe for review and reveals that the primary issue is whether the claim is barred by the doctrine of res judicata.[4]

## III. Analysis

The doctrine of res judicata precludes litigation of both all claims that were previously litigated, and all claims that could have been litigated. A party that invokes this doctrine must establish its propriety by satisfying the following four elements: (1) the prior decision must be rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action. *See Davila v. Delta Airlines, Inc.*, 326 F.3d 1183 (11th Cir. 2003); *In re Piper Aircraft Corp.*, 244 F.3d 1289 (11th Cir. 2001). Once these four elements have been established the court further considers whether the claim in the instant action could have been brought in the previous case and, if so, res judicata bars the instant action.

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[3] The United States subsequently filed a Motion for Summary Judgment (DE 35), and Supplemental Authority (DE 38) relying on the language of 19 U.S.C. § 1584, the undisputed facts and *United States v. Rigel Ships Agencies, Inc. et al.*, Case No. 03-21086-Civ-Martinez. However, the case relied on by the Unites States did not have the issue *of res judicata* that exists in the present action.

[4] Because the Defendants are entitled to summary judgment on the grounds of res judicata, the Court does not discuss the Defendants' remaining arguments. However the Court does note that it is unlikely the Defendants would have prevailed on those theories.

There are two different bars that can be set by former litigation. They are "claim" preclusion and "issue" preclusion. Claim preclusion has a broader effect on the instant action, because if the former action and the instant action arise out of the same cause of action then all claims that were brought and all claims that could have been brought will be barred. *Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1271 (11th Cir. 2002). However, Issue preclusion sets a more limited bar in that if the action arises from a different cause of action only issues that were litigated or that are common to both will be barred. *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1550 (11th Cir. 1990 ), *cert. denied*, 498 U.S. 959 (1990).

**(1) Prior Decision Must be from a Court of Competent Jurisdiction**

The first prong of the four step analysis requires that the prior action must have been brought in a court of competent jurisdiction. Since the Forfeiture action was brought in the United States District Court of the Southern District of Florida, the first prong of the test is satisfied.

**(2) Final Judgment on the Merits**

The second prong of the analysis requires that the prior action have ended in a final judgment on the merits. The Eleventh Circuit has stated that, when applying the res judicata test, in the context of claim preclusion, consent judgments are considered to have the same force and effect as judgments entered after a trial on the merits. *Hallco Mgf. Co., Inc. v. Foster*, F.3d 1290, 1294 (Fed Cir. 2001). *United States v. Jefferson County*, 720 F.2d 1511, 1517-18 (11th Cir. 1983) (the principles of res judicata apply to consent decrees). "A judgment that is entered with prejudice under the terms of

a settlement, whether by stipulated dismissal [or] consent judgment. . . bars a second suit". *Langton v. Hogan*, 71 F.3d 930, 935 (1st Cir. 1995). Here, the parties entered into a Settlement Agreement, wherein Ameritrade consented to a Default Judgment in favor of the United States. Accordingly, the final judgment on the merits element is satisfied.

**(3) Same Parties or Privy**

A party for the purposes of former adjudication, includes "all who are directly interested in the subject matter and who have a right to make defense, control the proceedings, examine and cross-examine witnesses and appeal from the judgment if appeal lies." 1 A. Freeman, A Treatise of the Law of Judgments § 430 at 936-37 (5th ed. 1925). Claim preclusion applies only if the two cases "involve the same parties or their privies." *In re Piper Aircraft Corp.*, 244 F.3d at 1296. "When two parties are so closely aligned in interest that one is the virtual representative of the other, a claim by or against one will serve to bar the same claim by or against the other.'" *Langton*, 71 F.3d at 935.

Here, the United States and Ameritrade are parties to both actions. The fact that Ameritrade inserted itself in the prior action has no bearing on the issue. The test does not require a determination of how a party became a part of the action. Additionally, there is no question that Ameritrade and WIIC are in privy, since together they issued the Customs Bond for the Friendly Express. The United States concedes the fact that they are in privy by asking that they be held jointly and severally liable on the bond. Therefore, the third element of res judicata is satisfied, as the instant action involves the same parties from the Forfeiture action.

**(4) Same Claim or Cause of Action**

The Court must determine whelher the cause of action is the same in both actions. In making this determination the court must decide if the actions arise "out of the same nucleus of operative facts or are based upon the same factual predicate." *In re PiperAircraft Corp.*, 244 F.3d at 1297. The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case; therefore, a court must compare the substance of the actions, not their form. *Pelletir v. Zweifel,* 921 F.2d 1465 (11th Cir. 1991).

Here, the "factual predicate" behind both actions is the presence of 51 pounds of cocaine aboard the Friendly Express. The cocaine is the one transaction upon which each action is predicated. The Forfeiture action was based on the cocaine's presence on the vessel; the Civil Penalty action was based on the failure to claim the cocaine on the manifest. The "nucleus" is the cocaine.

The United States argues that claim preclusion would be inappropriate because the first proceeding was an *In Rem* proceeding and the instant action is an *In Personam.* However the Court finds the Plaintiff's theory is not supported by the case law. *See Continental Grain Co. V. The Barge FBL-585*, 364 U.S. 19, 25 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960) ("Courts have not fell themselves bound by this fiction [the fiction that an in rem action is against a piece of property] when confronted with the argument that because in rem and in personam actions involve different parties."). *See also B. & B. No. 10 v. Olsen*, 121 F.2d 704 (2d Cir. 1941) (applying the claim preclusion doctrine using a prior *in rem* proceeding). Therefore the distinction relied upon by the United States is misplaced.

The United States argues, in the alternative, that they were unable to bring this civil penalty action at the same time of the forfeiture action, but fails to cite any case law or statutory authority that prohibited them from doing so. Additionally, the mere fact that Ameritrade reserved the right to dispute the penalty in the Settlement Agreement does not serve to reserve the pre~ent action. If those were the United States's intentions, that needed to be specifically stated in the terms of the Agreement.

## IV. Conclusion

The Court is mindful of the Defendants' burden of establishing that they are entitled to summary judgment. Nevertheless, after a review of the evidence in the record, the court finds that no genuine issue of material fact exists whether the instant action is barred by the doctrine of res judicata. All of the elements of the four-pronged test are satisfied. Accordingly, it is ORDERED AND ADJUDGED that the Defendants' motions for summary judgment are GRANTED and Plaintiff's motion for summary judgment is DENIED. The Court will enter judgment for these Defendants by separate order.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of September, 2004.

/s/
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**MIAMI DIVISION**

**No. 99-2633**

**[Filed September 30, 1999]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| THE MOTOR VESSEL FRIENDLY EXPRESS, TOGETHER WITH ITS TACKLE, APPAREL, GEAR AND EQUIPMENT, | ) |
| | ) |
| Defendant. | ) |

## COMPLAINT FOR FORFEITURE IN REM

Plaintiff, United States of America, hereby files this complaint for Forfeiture In Rem against the above-captioned defendant property, and in support thereof alleges the following:

1. This is a civil action for forfeiture in rem of the above-captioned defendant property. Jurisdiction is vested in this Court pursuant to Title 28, United States Code, §§ 1345, 1355 and 2461.

2. This Court has venue pursuant to Title 28, United States Code, § 1395 because the defendant property is located within the Southern District of Florida and will so remain during the pendency of these proceedings.

3. The defendant property is more particularly described as follows:

> THE MOTOR VESSEL FRIENDLY EXPRESS, 133' IN LENGTH, WITH BELIZE REGISTRATION NUMBER 11981476, TOGETHER WITH ITS TACKLE, APPAREL, GEAR AND EQUIPMENT.

4. The United States seeks forfeiture of the defendant property pursuant to 19 U.S.C. § 1595a, 19 U.S.C. § 1703 and/or 49 U.S.C. § 80303.

## FACTUAL ALLEGATIONS

5. On or about July 2, 1998, the Motor Vessel Friendly Express arrived at the Port of Miami from Gonaives, Haiti.

6. Officers of the United States Customs Service ("Customs") conducted an inspection of the vessel.

7. During the inspection, the Customs Officers found a concealed compartment welded into the deck of the vessel.

8. Upon further inspection, the officers discovered nineteen (19) packages of cocaine hidden and secreted inside the aforementioned concealed compartment.

9. Several of the crew members of the vessel were interviewed.

10. One of the crew members stated that the cocaine had been placed onboard the vessel by the owner prior to its departure from Haiti.

11. On or about July 2, 1998, the defendant vessel was seized by Customs' Miami Marine Smuggling Investigations Group.

**FORFEITURE ALLEGATION - COUNT ONE**

12. The allegations of paragraphs one (1) through eleven (11) are re-alleged and incorporated herein.

13. Pursuant to 19 U.S.C. § 1595a(a), any and every vessel used in, to aid in, or to facilitate the importation, bringing in, unlading, landing, removal, concealing or harboring of any article which is being or has been introduced, or attempted to be introduced into the United States contrary to law may be seized and forfeited to the United States.

14. By reason of the foregoing, the defendant vessel is forfeit to the United States of America, pursuant to 19 U.S.C. § 1595a(a), in that the defendant vessel was used in, to aid in, or to facilitate the importation, bringing in, unlading, landing, removal, concealing or harboring of cocaine which was being or had been introduced, or was attempted to be introduced

into the United States in violation of 21 U.S.C. §§ 801, et seq.

**FORFEITURE ALLEGATION - COUNT TWO**

15. The allegations of paragraphs one (1) through eleven (11) are re-alleged and incorporated herein.

16. Pursuant to 19 U.S.C. § 1703, whenever any vessel is built, purchased, fitted out in whole or in part, or held, in the United States or elsewhere, for the purpose of being employed to smuggle any merchandise into the United States, or whenever any vessel which is found, or discovered to have been employed, or attempted to be employed, within the Untied States for the purpose of smuggling merchandise into the United States, is found at any place at which such vessel may be examined by a customs officer in the enforcement of any law respecting the revenue of the United States, then the said vessel shall be seized and forfeited to the United States.

17. By reason of the foregoing, the defendant vessel is forfeit to the United States of America, pursuant to 19 U.S.C. § 1703, in that the defendant vessel was built, purchased, fitted out in whole or in part, or held, in the United States or elsewhere, for the purpose of being employed to smuggle merchandise into the United States, or the defendant vessel was found, or discovered to have been employed, or attempted to be employed, within the Untied States for the purpose of smuggling merchandise into the United States and the defendant vessel was found at a place at which the vessel could be examined by a customs officer in the enforcement of laws respecting the revenue of the United States.

## FORFEITURE ALLEGATION - COUNT THREE

18. The allegations of paragraphs one (1) through eleven (11) are re-alleged and incorporated herein.

19. Title 49, United States Code, Section 80303, provides for the seizure and forfeiture of any vessel involved in a violation of 49 U.S.C. § 80302.

20. Title 49, United States Code, Section 80302 prohibits the use of a vessel to transport, to conceal or possess, or to facilltate the transportation, concealment, receipt, possession, purchase) sale or exchange of contraband.

21. By reason of the foregoing, the defendant vessel is forfeit to the United States of America, pursuant to 49 U.S.C. § 80303, in that the defendant vessel was used to transport, conceal or possess, or to facilitate the transportation, concealment, receipt, possession, purchase, sale or exchange of cocaine, in violation of 49 U.S.C. § 80302.

WHEREFORE, Plaintiff United States of America requests that a warrant of arrest be issued for the defendant property; that the Court direct all persons having any claim to or interest in the defendant property to appear and show cause why the forfeiture should not be decreed or suffer default of such claim or interest; that the court declare the defendant property condemned and forfeited to the United States of America for disposition according to law; and that the United States be granted such other and further relief as this Court deems just and proper, together with costs and disbursements of this action.

Dated this 30th day of September, 1999.

Respectfully submitted,

THOMAS E. SCOTT
UNITED STATES ATTORNEY

By:_____

ARIMENTHA R. WALKINS
ASSISTANT U.S. ATTORNEY
99 N.E. 4th Street, 7th Floor
Miami, Florida 33132-2111
Tel. (305) 961-9091
Fax: (305) 536-7599
Fla. Bar No. 0897787

**VERIFICATION**

I, Douglas Morgan, Criminal Investigator, United States Customs Service, hereby declare under penalty of perjury as provided by Title 28, United States Code, Section 1746, that the foregoing Complaint for Forfeiture In Rem is based upon information known to me, and that the facts alleged therein are true and correct to the best of my knowledge and belief.

EXECUTED, on this 30th day of September, 1999.

/s/_____
DOUGLAS MORGAN
CRIMINAL INVESTIGATOR
UNITED STATES CUSTOMS SERVICE

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**No. 99-2633-CIV-SEITZ**

**[Filed June 8, 2000]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| MOTOR VESSEL FRIENDLY EXPRESS, ETC., | ) |
| | ) |
| Defendant. | ) |
| | ) |

**SETTLEMENT AGREEMENT AND CONSENT TO FORFEITURE OF CLAIMANT AMERITRADE TERMINALS, INC.**

Plaintiff United States of America and claimant Ameritrade Terminals, Inc. hereby enter into this agreement in compromise and settlement of the claim filed by Ameritrade Terminals, Inc. in the above-referenced case, as follows:

## STATEMENT OF FACTS

1. On September 30, 1999, Plaintiff United States filed its verified Complaint for Forfeiture In Rem seeking forfeiture of the defendant motor vessel, pursuant to 19 U.S.C. § 1595a, 19 U.S.C. § 1703 and/or 49 U.S.C. § 80303.

2. On October 1, 1999, the Court issued a Warrant of Arrest In Rem for the defendant motor vessel and, on October 12, 1999, process was executed against the defendant motor vessel.

3. On or about November 1, 1999, claimant Ameritrade Terminals, Inc. ("Ameritrade") filed a verified Claim with respect to the defendant motor vessel and, on or about November 15, 1999, Ameritrade filed its answer to the Complaint.

4. Plaintiff United States and Ameritrade have reached an agreement concerning the claim of Ameritrade.

## AGREEMENT

5. The parties stipulate and agree that this agreement shall be contingent upon the entry by the Court of an order forfeiting the defendant motor vessel to the United States.

6. Upon the Court's entry of an order of forfeiture, Plaintiff United States hereby agrees to pay Ameritrade the sum of $5,306.83, in full and complete settlement and satisfaction of Ameritrade's claim against the defendant motor vessel.

7. Ameritrade hereby agrees to accept the stated payment in full and complete settlement and satisfaction of its claim against the defendant motor vessel.

8. Ameritrade further agrees that the defendant motor vessel may be forfeited to the United States of America, for disposition according to law, pursuant to 19 U.S.C. § 1595a, 19 U.S.C. § 1703 and/or 49 U.S.C. § 80303, free and clear of its claim against the motor vessel.

9. Upon payment of the sum of $5,306.83 to Ameritrade, Ameritrade agrees to assign and convey to the United States its claim against the defendant motor vessel for the specified amount.

10. The parties hereby stipulate and agree that Ameritrade shall have thirty (30) days from the date of execution of this agreement to file and/or to amend its petition with the United States Customs Service for mitigation and remission of the $50,000 fine/penalty assessed against Ameritrade with respect to the bond posted by Ameritrade on behalf of the defendant motor vessel. Claimant Ameritrade hereby reserves the right to pursue whatever claims, defenses and remedies it may have concerning the $50,000 bond.

11. Except as stated in paragraph 10 above, claimant Ameritrade hereby waives any and all claims against and agrees to forever release and hold harmless the United States, including but not limited to the United States Customs Service, and all their officers, employees, agents, and representatives from any and all claims, actions, causes of action, suits, demands, damages, debts, and judgments of whatever kind or description that might now or hereafter exist on account of or in connection with any matters relating directly or indirectly to the seizure, detention, possession,

handling, prosecution, forfeiture and/or disposition of the defendant motor vessel, and with respect to any matters relating directly or indirectly to this litigation.

12. The parties stipulate and agree that the payment of Ameritrade's claim in this case will establish no precedent or basis for payment of any similar future claim of Ameritrade or any other party.

13. The parties stipulate and agree that each party shall bears its own costs and attorney's fees related to this action.

14. The parties stipulate and agree that if the defendant motor vessel is not forfeited to the United States, then this agreement shall become null and void, except that Ameritrade may still, within thirty day of the execution of this agreement, file and/or amend its petition for mitigation and remission of the $50,000 fine/penalty assessed against Ameritrade with respect to the bond posted by Ameritrade on behalf of the defendant motor vessel.

15. The parties stipulate and agree that the Court shall retain jurisdiction in this action for the purpose of enforcing the terms of this agreement.

THOMAS E. SCOTT
UNITED STATES ATTORNEY

By: /s/
ARIMENTHA R. WALKINS
ASSISTANT U.S. ATTORNEY
Florida Bar No. 0897787
99 N.E. 4th Street, 7th Floor
Miami, Florida 33132

Tel: (305) 961-9091
Fax: (305) 536-7599

ON BEHALF OF CLAIMANT

/s/_____

GERHARDT A. SCHREIBER, ESQUIRE
SCHREIBER RODON-AVAREZ, P.A.
COUNSEL FOR CLAIMANT
Fla. Bar No. 194655
2222 Ponce de Leon Boulevard
Penthouse Suite
Coral Gables, Florida 33134
Tel: (305) 445-8881
Fax: (305) 445-6761

/s/_____

CLAIMANT
AMERITRADE TERMINALS, INC.
RICHARD DUBIN, PRESIDENT

Date of last signing party: 6/7/00

## APPENDIX E

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**No. 99-2633-CIV-SEITZ/GARBER**

**[Filed June 29, 2000]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| MOTOR VESSEL FRIENDLY EXPRESS, ETC., | ) |
| | ) |
| Defendant. | ) |
| | ) |

### DEFAULT JUDGMENT OF FORFEITURE

THIS CAUSE came before the Court on Plaintiff United States' Motion for Entry of Default Judgment of Forfeiture. The Court has considered the motion and the pertinent portions of the record, and is otherwise duly advised in the premises. Accordingly, the Court makes the following findings:

1. On September 30, 1999, Plaintiff filed its Complaint for Forfeiture In Rem of the Motor Vessel Friendly Express (the "defendant motor vessel"). The Complaint alleges that the defendant motor vessel is subject to forfeiture to the United States pursuant to 19 U.S.C. § 1595a, 19 U.S.C. § 1703 and/or 49 U.S.C. § 80303.

2. On October 1, 1999, the Court entered a Warrant of Arrest In Rem for the defendant motor vessel, and, on October 12, 1999, process was duly executed against the defendant motor vessel by the United States Customs Service.

3. On October 22, 1999, a Public Notice of Action and Arrest giving notice of the pending forfeiture action was published in the Miami Daily Business Review and Proof of Publication was filed with the Court on October 28, 1999.

4. On or about November 1, 1999, claimant Friendly Express, Inc. ("Friendly Express") filed a verified claim alleging that it is the owner of the defendant motor vessel, and, on or about November 16, 2000, Friendly Express filed its answer to the Complaint.

5. On or about November 4, 1999, claimant Ameritrade Terminals, Inc. ("Ameritrade") filed a verified claim alleging that it has a maritime claim against the defendant motor vessel, and, on or about November 16, 1999, Ameritrade filed its answer to the Complaint.

6. The time provided by statute for filing a timely claim and answer has expired, and no other claims or answers have been filed in this action.

7. On June 7, 2000, the United States and Ameritrade entered into a Settlement Agreement and Consent to

Forfeiture ("Settlement Agreement") in settlement of Ameritrade's claim.

8. Friendly Express has failed repeatedly to produce designated corporate representative(s) and corporate officers for deposition despite being served with proper notice.

9. No motion for protective order has been filed by or on behalf of Friendly Express.

10. Friendly Express has failed to comply with the May 4, 2000 Court Order requiring it to designate alternative counsel within ten days of the date of the Order, and to indicate a telephone number and address where papers may be served.

BASED on the above, it is hereby ORDERED and ADJUDGED as follows:

1. Plaintiff's motion is GRANTED.

2. A default judgment of forfeiture is hereby entered against Friendly Express, Inc.

3. The Settlement Agreement between the United States and Ameritrade is hereby approved, adopted and incorporated herein by reference thereto.

4. The United States shall pay Ameritrade the sum of $5,306.83 in full and complete settlement and satisfaction of its claim against the defendant motor vessel.

5. The defendant motor vessel, the Motor Vessel Friendly Express, together with its tackle, apparel, gear, and equipment, is hereby forfeited to the United States, pursuant

to 19 U.S.C. § 1595a, 19 U.S.C. § 1703 and/or 49 U.S.C. § 80303, for disposition in accordance with law.

6. The cost bond filed herein by Friendly Express, Inc. is forfeited to the United States for disposition in accordance with law.

7. Each party shall bear its own costs and attorney's fees related to the action.

8. The Court retains jurisdiction in this matter to enforce the terms and conditions of the Settlement Agreement between the United States and Ameritrade.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 28th day of June, 2000.

/s/
PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

## APPENDIX F

**U.S. District Court**
**Southern District of Florida (Miami)**
**CIVIL DOCKET FOR CASE #: 99-CV-2633**

**United States v. Motor Vessel Friend**

Filed: 09/30/99
Assigned to: Judge Patricia A. Seitz
Demand: $0,000
Nature of Suit: 690
Lead Docket: None
Jurisdiction: US Plaintiff
Dkt# in other court: None
Cause: 28:1345 Complaint for Forfeiture

| | |
|---|---|
| UNITED STATES OF AMERICA<br>plaintiff | Arimentha R. Walkins, AUSA<br>FTS 536-7599<br>305-961-9091<br>[COR LD NTC]<br>United States Attorney's Office<br>99 NE 4th Street<br>Miami, FL 33132<br>305-961-9000 |

v.

THE MOTOR VESSEL

| | |
|---|---|
| FRIENDLY EXPRESS, Together with its tackle, apparel, gear and equipment defendant | |
| AMERITRADE TERMINALS INC. claimant | Gerhardt Adam Schreiber [term 05/04/00] FTS 445-6761 [COR LD NTC] Schreiber Rodon-Alvarez 2222 Ponce De Leon Boulevard Penthouse Coral Gables, FL 33134 305-445-8881 |
| FRIENDLY EXPRESS, INC. claimant | Gerhardt Adam Schreiber [term 05/04/00] (See above) [COR LD NTC] |
| AMERITRADE TERMINALS INC. claimant | Gerhardt Adam Schreiber [term 05/04/00] (See above) [COR LD NTC] |

**DOCKET PROCEEDINGS**

| DATE | # | DOCKET ENTRY |
|---|---|---|
| 9/30/99 | 1 | COMPLAINT for forfeiture in rem filed no fee B-2 BLG (cj) [Entry date 10/01/99] |

| | | |
|---|---|---|
| 9/30/99 | 2 | Civil Action Certification, by United States Attorney. (cj) [Entry date 10/01/99] |
| 9/30/99 | -- | Magistrate identification: Magistrate Judge Barry L Garber (cj) [Entry date 10/01/99] |
| 10/1/99 | 3 | ORDER that clerk issue warrant of arrest (Signed by Judge Patricia A. Seitz on 10/1/99) CCAP [EOD Date: 10/5/99] (hr) [Entry date 10/05/99] [Edit date 01/31/00] |
| 10/18/99 | 4 | RETURN OF SERVICE executed for Motor Vessel Friend on 10/12/99 stored at Schurger Dive and Salvage, Miami, FL (hr) [Entry date 10/20/99] |
| 10/28/99 | 5 | Proof of publication notice of action and arrest from the: Miami Daily Business Review dated: 10/22/99 Response deadline is 11/3/99 (hr) [Entry date 11/02/99] |
| 11/1/99 | 6 | CLAIM by Ameritrade Terminals (ra) [Entry date 11/04/99] |
| 11/1/99 | 7 | CLAIM OF OWNER by Friendly Express (ra) [Entry date 11/04/99] |
| 11/4/99 | 8 | CLAIM by Ameritrade Terminals Answer due on 11/24/99 for |

| | | |
|---|---|---|
| | | Friendly Express (hr) [Entry date 11/08/99] |
| 11/16/99 | 9 | ANSWER to Complaint by Ameritrade Terminals (Attorney Gerhardt Adam Schreiber), (td) [Entry date 11/18/99] |
| 11/16/99 | 10 | ANSWER to Complaint by Ameritrade Terminals, Friendly express (td) [Entry date 11/18/99] |
| 12/9/99 | 11 | Scheduling Report of Scheduling Meeting by United States, Ameritrade Terminals, Friendly Express (hr) [Entry date 12/10/99] |
| 1/12/00 | 12 | ORDER Re: Bench Trial Instructions (Signed by Judge Patricia A. Seitz on 1/10/00) CCAP [EOD Date: 1/14/00] (hr) [Entry date 01/14/00] |
| 1/12/00 | 13 | ORDER REFERRING DISCOVERY MATTERS and all motions for fees and costs to Magistrate Judge Garber set bench trial for 9:00 11/20/00 before Judge Patricia A. Seitz, set calendar call for 1:15 11/15/00 before Judge Patricia A. Seitz, set pretrial conference for 9:00 5/25/00 before Judge Patricia A. Seitz, set pretrial stipulation due for 10/13/00 and other pretrial deadlines (Signed by |

| | | |
|---|---|---|
| | | Judge Patricia A. Seitz on 1/10/00) CCAP (hr) [Entry date 01/14/00] |
| 1/21/00 | 14 | MOTION by United States for reconsideration of [3-2] order referring case to mediation (hr) [Entry date 01/24/00] |
| 1/28/00 | 15 | ORDER granting [14-1] motion for reconsideration of [3-2] order referring case to mediation vacating order of referral to mediation (Signed by Judge Patricia A. Seitz on 1/28/00) CCAP [EOD Date: 1/31/00] (hr) [Entry date 01/31/00] |
| 4/10/00 | 16 | NOTICE of Unavailability of counsel from 4/17/00 through 4/21/00 by United States (hr) [Entry date 04/11/00] |
| 4/11/00 | 17 | MOTION by Motor Vessel Friend for Gerhardt A. Schreiber to withdraw as attorney (hr) [Entry date 04/12/00] |
| 4/14/00 | 18 | AMENDED MOTION by Friendly Express for Gerhardt A. Schreiber to withdraw as attorney referring to [18-1] motion (hr) [Entry date 04/17/00] |

| | | |
|---|---|---|
| 4/17/00 | 19 | RESPONSE by United States to [17-1] motion for Gerhardt A. Schreiber to withdraw as attorney (hr) [Entry date 04/18/00] |
| 5/4/00 | 20 | ORDER granting [17-1] motion for Gerhardt A. Schreiber to withdraw as attorney (Terminated: attorney Gerhardt Adam Schreiber for Ameritrade Terminals, attorney Gerhardt Adam Schreiber for Friendly Express, attorney Gerhardt Adam Schreiber for Ameritrade Terminals (Signed by Judge Patricia A. Seitz on 5/4/00) CCAP [EOD Date: 5/8/00] (hr) [Entry date 05/08/00] |
| 6/7/00 | 21 | Settlement agreement by United States, Ameritrade Terminals and consent to forfeiture of claimant Ameritrade. (hr) [Entry date 06/08/00] |
| 6/8/00 | 22 | MOTION with memorandum in support by United States for default judgment of forfeiture against Motor Vessel Friend (hr) [Entry date 06/09/00] |
| 6/29/00 | 23 | ORDER granting [22-1] motion for default judgment of forfeiture against Motor Vessel Friendly Express; settlement agreement between U.S. and Ameritrade is |

| | | |
|---|---|---|
| | | approved and adopted; U.S. to pay Ameritrade the sum of $5,306.83 as settlement; cost bond is forfeited to the U.S. (Signed by Judge Patricia A. Seitz on 6/28/00) CCAP [EOD Date: 6/30/00] (hr) [Entry date 06/30/00] |
| 7/1/00 | -- | CASE CLOSED. Case and Motions no longer referred to Magistrate. (hr) [Entry date 07/13/00] |

## APPENDIX G

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**No. 03-21755**

**[Filed June 27, 2003]**

| | |
|---|---|
| UNITED STATES, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| AMERITRADE TERMINALS, INC., and WASHINGTON INTERNATIONAL INSURANCE CO. | ) |
| | ) |
| Defendants. | ) |

### COMPLAINT

Plaintiff, the United States of America, by and through the undersigned Assistant U.S. Attorney, alleges the following upon information and belief:

### Nature of Action

1. The United States brings this action on behalf of the former U.S. Customs Service, Department of

Treasury, which is currently known as the Bureau of Customs and Border Protection, Department of Homeland Security ("Customs"), to recover a civil penalty that is secured by a bond.

**Jurisdiction**

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1345 and 1355(a).

**Parties**

3. Plaintiff Customs is, and at all times relevant to this action was, vested with the duty to enforce and execute the provisions of Titles 18 and 19 of the United States Code.

4. Defendant Ameritrade Terminals, Inc. ("Ameritrade") is a Florida corporation which, at all times relevant to this action, was acting as the agent for Friendly Express, Inc. (Friendly Express). At all times relevant to this action, Friendly Express owned the cargo shipping vessel M/V Friendly Express.

5. Defendant Washington International Insurance Co. ("Washington International"), is an Illinois corporation which, at all times relevant to this action, was doing business in Miami-Dade County, Florida. Washington International served as surety for Ameritrade on an international carrier bond.

**General Allegations**

6. Within forty-eight (48) hours after the arrival at any port or place in the United States of any vessel from

a foreign port or place or any foreign vessel from a domestic port, the master of the vessel shall make formal entry at the nearest Customs facility or such other place as prescribed by regulation. 19 C.F.R. § 4.3 and 19 U.S.C. § 1434.

7. Every vessel required to make entry under 19 U.S.C. § 1434 shall have a manifest. 19 U.S.C. § 1431(a). The manifest consists of several documents which are identified at 19 U.S.C. § 1431(d) and 19 C.F.R § 4.7(a).

8. If any merchandise is found on the vessel which is not included in the manifest, and if such merchandise is cocaine, the master of the vessel or person in charge of the vessel or the owner of the vessel or any person directly or indirectly responsible for the vessel shall be liable for a penalty of $1,000 for each ounce of cocaine found. 19 U.S.C. § 1584(a)(2).

9. Customs regulations provide, among other things, that no vessel arriving from a foreign port may lade or unlade passengers, cargo, baggage or other articles until Customs issues a permit or special license on Customs Form 3171. 19 C.F.R. § 4.30(c).

10. Customs regulations further provide that the request for a permit or special license shall not be approved by Customs unless a cash deposit or bond has been filed on Customs Form 301. 19 C.F.R. § 4.30(a) (c); 19 U.S.C. § 1623.

11. With respect to an international carrier bond, both the principal and surety are jointly and severally liable for any penalties incurred by a vessel, master, owner or

person in charge of a vessel. 19 C.F.R. § 113.64(a); 19 U.S.C. § 1623(b).

**Specific Allegations**

12. On or about July 1, 1998, Ameritrade notified Customs on Customs Form 3171 that the M/V Friendly Express, owned by Friendly Express, would be arriving in Miami from Cap Haitien, Haiti. A copy of the Form 3171 is attached as Exhibit "A." On this form, Ameritrade applied to Customs for a permit and special license, and notified Customs that it was the principal on an $50,000 international carrier bond posted for entry of the M/V Friendly Express (the "Bond"). Ameritrade also notified Customs that Washington International was the surety on the Bond. A copy of Customs Form 301 is attached as Exhibit "B."

13. On or about July 2, 1998, the M/V Friendly Express entered the United States in Miami from Haiti.

14. The manifest documents for the M/V Friendly Express provided to Customs reflected no cargo. Specifically on Customs Form 1301, the response to the request for a brief description of the cargo was "In Ballast." A copy of the Form 1301 is attached as Exhibit "C."

15. On July 2, 1998, Customs inspectors searched the M/V Friendly Express and discovered approximately 51 pounds of cocaine in 19 packages underneath the cargo bay floor of the vessel.

16. No cocaine was listed on the manifest.

17. On or about July 6, 1998, Customs issued a Notice of Civil Penalty to Friendly Express, owner of the M/V Friendly Express, care of Ameritrade. A copy of the Notice is attached as Exhibit "D." Pursuant to the Notice, Customs assessed a penalty of five hundred sixty-six thousand dollars ($566,000.00), which represents a penalty of up to $1,000 per ounce of cocaine found on the vessel. 19 C.F.R. § 4.30 (c); 19 U.S.C. § 1584(a)(2).

18. By a letter dated August 28, 1998, Ameritrade acknowledged receipt of the Notice of Civil Penalty. By letter dated September 2, 1998, Customs notified Ameritrade that it would continue to seek the $566,000 penalty.

19. By a letter dated July 6, 2000, Ameritrade, through its attorneys, petitioned for remission of the penalty. On May 7, 2001, Customs sent a notice of decision to the petitioner that the petition had been denied.

20. No payments have been made by Friendly Express, Inc. or Ameritrade.

21. On or about May 2, 2000, Customs issued a Demand Notice of Penalty to Washington International, the surety on the Bond. A copy of the Notice is attached as Exhibit "E." Pursuant to the Notice, Customs assessed a penalty of five hundred sixty-six thousand dollars ($566,000.00), which represents a penalty of up to $1,000 per ounce of cocaine found on the vessel. 19 C.F.R. § 4.30 (c); 19 U.S.C. § 1584(a)(2).

22. By a letter dated August 16, 2000, Washington International, through its attorneys, petitioned for the

cancellation of any penalty for Washington International. On May 8, 2001, Customs sent a notice of decision to the petitioner that the petition had been denied.

23. No payments have been made by Washington International.

24. On or about July 23, 2002, Customs issued Amended Notices of Civil Penalty to Friendly Express, Inc., Owner M/V Friendly Express; Ameritrade Terminals, Inc., Agent/Principal on Bond; and Cristobal Perez, Master, care of Ameritrade Terminals, Inc., to reflect the name of the owner and master of the vessel, M/V Friendly Express. Copies of the Notices are attached as Composite Exhibit "F." Pursuant to these Notices, Customs assessed a penalty of five hundred sixty-six thousand dollars ($566,000.00), which represents a penalty of up to $ 1,000 per ounce of cocaine found on the vessel. 19 C.F.R. § 4.30 (c); 19 U.S.C. § 1584(a)(2).

25. No response has been received from, nor payment made by, Friendly Express, Inc., Ameritrade Terminals, Inc., or Cristobal Perez, Master.

**COUNT I**
**(Ameritrade)**

26. Plaintiff realleges paragraphs 1 through 25 as though fully set forth herein.

27. Customs properly assessed a civil penalty against Friendly Express, owner of the M/V Friendly Express, for violation of 19 U.S.C. §§ 1584.

28. The civil penalty amount has never been paid.

29. Ameritrade, the principal on the Bond, is jointly and severally liable with Washington International, the surety, to the full amount of the Bond ($50,000.00) for the civil penalty incurred by Friendly Express.

WHEREFORE, Plaintiff, the United States of America, respectfully requests that the Court enter a final judgment against Ameritrade in the amount of fifty thousand dollars ($50,000.00), plus interest and costs, and award any and all other relief the Court deems necessary and appropriate.

**COUNT II**
**(Washington International)**

29. Plaintiff realleges paragraphs 1 through 25 as though fully set forth herein.

30. Customs properly assessed a civil penalty against Friendly Express, owner of the M/V Friendly Express, for violation of 19 U.S.C. §§ 1584.

31. The civil penalty amount has never been paid.

32. Washington International, the surety on the Bond, is jointly and severally liable with Ameritrade, the principal, to the full amount of the Bond ($50,000.00) for the civil penalty incurred by Friendly Express.

WHEREFORE, Plaintiff, the United States of America, respectfully requests that the Court enter a final judgment against Washington International in the amount of fifty thousand dollars ($50,000.00), plus interest and costs, and award any and all other relief the Court deems necessary and appropriate.

Respectfully submitted,

MARCOS DANIEL JIMENEZ
UNITED STATES ATTORNEY
By:_____
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## APPENDIX H

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**No. 03-21755-CIV-HIGHSMITH/TURNOFF**

**[Filed December 15, 2003]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| v. | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| AMERITRADE TERMINALS, INC., and WASHINGTON INTERNATIONAL INSURANCE COMPANY, | ) |
| | ) |
| Defendants. | ) |
| | ) |

**DECLARATION OF RICHARD DUBIN IN SUPPORT OF DEFENDANT WASHINGTON INTERNATIONAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AGAINST THE UNITED STATES**

NOW COMES, Richard Dubin, and, under penalty of perjury, states the following:

1. I am the president of Ameritrade Terminals, Inc. (Ameritrade) and have held that position since 1994.

2. Ameritrade acts as a ship agency entering and clearing vessels into the commerce of the United States.

3. Prior to the voyage in question the M.S. Friendly Express, Inc., had entered into the waters of the United States from Europe. After repairs the vessel was cleared for Haiti. Ameritrade became the vessel's Miami port agent mad the vessel departed to Haiti.

4. On the return voyage Ameritrade learned that the vessel required assistance (vessel apparently ran out of fuel) and the owner of the vessel requested that it be towed to a private dock on the Miami River. Ameritrade had given the appropriate government agencies, including United States Customs, advance notice of the arrival of this vessel.

5. The master of the Friendly Express told me that the vessel was not carrying any cargo (i.e. was in ballast) and he signed the Customs Form 1301 (General Declaration) stating that the vessel was in ballast and had no cargo manifest. (Exhibit A)

6. Soon thereafter Customs tbund illegal drugs and the vessel was seized. Additionally, United States Customs took control of the vessel's documents and crew and advised Ameritrade that the crew was to be sent to their home countries at Ameritrade's sole expense. Additionally, Ameritrade was advised that it must submit a formal entry even though illegal drugs had already been discovered and the vessel was seized and under control of U.S. Customs.

7. Pursuant to U.S. Customs direction Ameritrade submitted an application for entry and clearance of the vessel and paid the entrance fee. At that time Ameritrade attempted to file a corrected manifest, a routine procedure, but was not allowed to do so by U.S. Customs. No crew member was arrested or detained and Ameritrade sent the crew home.

8. Ameritrade did not participate in or have any knowledge of the preparation of the cargo manifest for the voyage to the United States. As soon as Ameritrade had information that the manifest was incorrect it attempted, pursuant to United States Statute, to file a corrected manifest which was refused by U.S. Customs.

9. Ameritrade had no knowledge of the illegal drugs found on board the vessel. If Ameritrade had any knowledge or suspected that drugs were on board, it would have immediately advised U.S. Customs, DEA, and other responsible agencies. Additionally, Ameritrade did not own, manage, operate, or, in any manner, control the vessel. Finally, Ameritrade fully cooperated with the authorities by providing contact information about the owners and managers of this vessel.

10. In conclusion, Ameritrade only acted as the vessel's Miami port agent by (1) advising all governmental agencies of the time and place of the vessel's arrival, (2) preparing entry documents, (3) assuming responsibility for the crew, and (4) fully cooperating with all governmental agencies. ATI did not apply for unloading of cargo; it only applied for entry and clearance of the vessel for which the bond was placed.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746 this 3rd day of December 2003.

/s/
Richard Dubin

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on December 15, 2002 upon Barbara Lagoa, Esq., U.S. Department of Justice, U.S. Attorney's Office, 99 N.E. 4th Street, Suite 200, Miami, Florida 33132; and Gerhardt Schreiber, Esq., Schreiber Rodon Alvarez, P.A., 2222 Ponce De Leon Boulevard, Penthouse Suite, Coral Gables, Florida 33134.

/s/
Edward M. Joffe

## APPENDIX I

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**No. 03-21755-CIV-HIGHSMITH**

**[Filed September 23, 2003]**

| | |
|---|---|
| THE UNITED STATES OF AMERICA | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| vs. | ) |
| | ) |
| AMERITRADE TERMINALS, INC. | ) |
| and WASHINGTON INTERNATIONAL | ) |
| INSURANCE COMPANY, | ) |
| | ) |
| Defendants. | ) |
| | ) |

**JOINT SCHEDULING REPORT**

Pursuant to this Court's August 27, 2003 Order and S.D. Fla. L.R. 16.1(B)(2), Plaintiff, The United States of America, and Defendants Ameritrade Terminals, Inc. and Washington International Insurance Company, file the following Joint Scheduling Report:

**1. Nature of the Claim and Cross Claim:**

This is an action by the United States of America to recover a civil penalty that is secured by a bond. Defendant Washington International has filed a cross claim against Defendant Arneritrade for breach of contract, indemnification, exoneration and quia timet. In addition, Defendant Washington International filed a motion to amend its Answer on September 22, 2003.

**2. Brief Summary of Uncontested Facts:**

For purposes of this litigation only, the parties will not contest the following facts:

a. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1345 and 1355(a).

b. The United States of America is and was at all times relevant vested with the duty to enforce and execute the provisions of Titles 18 and 19 of the United States Code.

c. Washington International served as surety for Ameritrade by providing Ameritrade with an international carrier bond in the sum of $50,0000.

d. Within forty-eight (48) hours after the arrival at any port or place in the United States of any vessel from a foreign port or place or any foreign vessel from a domestic post, the master of the vessel shall make formal entry at the nearest Customs facility or such other place as prescribed.

e. Every vessel required to make entry under 19 U.S.C. § 1434 shall have manifest.

f. Customs regulations provide, among other things, that no vessel arriving from a foreign port may lade or unlade passengers, cargo, baggage or other articles until Customs issues a permit or license on Customs Form 3171.

g. Customs regulations further provide that the request for a permit or special license shall not be approved by Customs unless a cash deposit or bond has been filed on Customs Form 301.

h. With respect to an international carrier bond, both the principal and the surety are jointly and severally liable for any penalties incurred by a vessel, master, owner, or person in charge of a vessel.

i. On or about July 1, 1998, Ameritrade notified Customs on Customs Form 3171 that the M/V Friendly Express, owned by Friendly Express, would be arriving in Miami from Cap Haitien, Haiti. On the 3171 Form, Ameritrade applied to Customs for a permit and special license and notified Customs that Washington International was the surety on the Bond.

j. On or about July 2, 1998, the M/V Friendly Express entered the United States in Miami from Haiti.

k. Customs issued a Notice of Civil Penalty to Friendly Express, owner of the M/V Friendly Express. By letter dated August 28, 1998, Ameritrade acknowledged receipt of the Notice of Civil Penalty. By letter dated September 2, 1998, Customs notified Ameritrade that it would continue to seeks the $566,000 penalty.

l. No payments have been made by Ameritrade.

m. On or about May 2, 2000, customs issued a Demand Notice of Penalty to Washington International, the surety on the bond.

n. By letter dated August 16, 2000, Washington International petitioned for the cancellation of any penalty. On may 8, 2001, Customs sent a notice of decision to the petitioner that the petition had been denied.

**3. Brief Summary of Legal Issues:**

a. Whether Defendant Ameritrade Terminals, Inc. was acting as an agent for Friendly Express, Inc.

b. Whether the Government had a duty to permit Ameritrade to file a manifest when none was previously submitted.

c. Whether U.S. Customs regulation 19 C.F.R. § 113.64 is authorized by statute or, alternatively, is ultra vires and unenforceable.

d. Whether 19 U.S.C. § 1584(a)(2) authorizes Customs to demand a bond for prospective penalties.

e. Whether Customs demanding a bond for prospective penalties offends the due process clause of the U.S. Constitution

f. Whether the Government is barred by the doctrine of Collateral Estoppel from bringing this action because of the conclusion of an earlier litigation in this judicial district, *Unites States v. Motor Vessel Friendly Express and Ameritrade Terminals, Inc.*, Case No. 99-2633-CIV-Seitz.

4. **Summary of Pending Motions:** There are no pending motions.

5. **Progress of Discovery and Approximate Time at which Case will Be Ready for Trial and/or Pre-trial Conference:** The last pleading filed in this action was served on August 26, 2003. No discovery has yet been propounded by the Parties but the parties anticipate propounding discovery within the next 45 -55 days. The parties anticipate that this case will be ready for Trial and/or Pre-trial Conference in April of 2004.

6. **Projected Time Necessary For Trial**: This is a non-jury trial.

7. **Unique Legal and Factual Aspects of Case Requiring Special Consideration by Court:** None.

8. **Potential need for Reference to A Special Master or Magistrate Judge:** All discovery matters as well as non-case dispositive motions may be referred to the Magistrate Judge. The parties, however, do not consent to having the Magistrate Judge conduct the trial in this action.

9. **Any other Information that might be helpful to the Court:** None at this time.

Signed an dated this 23rd day of September, 2003.

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